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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANGELIQUE SPURLOCK, Defendant and Appellant.	B282499 (Los Angeles County Super. Ct. No. MA066900)

APPEAL from a judgment of the Superior Court of Los Angeles County, Andrew E. Cooper, Judge. Affirmed and remanded with directions.

Judith Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Kathy S. Pomerantz, Deputy Attorney General, for Plaintiff and Respondent.

In September 2015, defendant Angelique Spurlock (defendant) shot and killed James McQuater (McQuater). A jury convicted her on a charge of second-degree murder, rejecting her defense that she killed McQuater—an ex-boyfriend with whom she had an abusive relationship—because she thought he was going to kill her. We consider whether the trial court erred in instructing the jury on intimate partner battering (IPB)[1] and in various evidentiary rulings, including a decision to admit evidence that defendant previously attacked McQuater with a machete or axe. We also decide whether the case should be remanded to give the trial court an opportunity to exercise newly-conferred discretion to strike a firearm sentencing enhancement that figured in defendant's sentence.

I. BACKGROUND

A. Defendant's Relationship with McQuater

Defendant met McQuater in or around 2010. In a recorded interview with Los Angeles County Sheriff's Department (LASD) investigators, defendant claimed McQuater started hitting her about a year into their relationship. Several witnesses at trial also testified about McQuater's abuse of defendant. Defendant's

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[1] "Although often referred to as 'battered women's syndrome,' 'intimate partner battering and its effects' is the more accurate and now preferred term. (See, e.g., Stats. 2004, ch. 609, §§ 1, 2 [changing references in Evid. Code, § 1107 and Pen. Code, § 1473.5 from 'battered women's syndrome' to 'intimate partner battering and its effects']; see also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1083-1084, fn. 3 [(*Humphrey*)]; *In re Nourn* (2006) 145 Cal.App.4th 820, 825, fn. 1[ ].)" (*In re Walker* (2007) 147 Cal.App.4th 533, 536, fn. 1.)

"godsister," Shaunishia Breaux (Breaux), said she saw McQuater "sock[ ] [defendant] in her nose" and "hit her in the stomach multiple times" in 2013, when defendant was pregnant with the couple's twin daughters. Defendant's brother, Eric Harrison (Harrison), testified he overheard two or three instances of physical or verbal abuse when he lived with defendant and McQuater between 2012 and 2014. Another "godsister," Lakeisha Hamm (Hamm), described, among other things, seeing defendant with a handprint on her face in summer 2015 and hearing McQuater tell defendant he would kill her before he left her. McQuater's mother, Renee Martin (Martin), said she once saw defendant with a black eye.

The parties stipulated at trial that McQuater had a prior 2014 domestic violence conviction, one in which defendant was the crime victim.[2] As a result, there was a valid protective order in effect on the day defendant killed McQuater, one that prevented him from having contact with or being near her.

Defendant told investigators she moved from Hawthorne to Palmdale—without McQuater—after he beat her in early 2014. The two briefly reconciled when McQuater was released from jail, but they broke up seven or eight months before the killing. Defendant said McQuater "stalk[ed]" her and regularly broke into her house in Palmdale, and she maintained he never lived with her in the Palmdale house. Neighbors, however, testified there were two adults living in defendant's Palmdale house, and one

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[2] The parties further stipulated that McQuater had a prior domestic violence conviction in 2009, stemming from his abuse of another former girlfriend, Kimberly Crisp (Crisp). Crisp testified McQuater severely beat her on multiple occasions.

said he saw McQuater there "[p]ractically every day." When investigators searched the home after defendant killed McQuater, they found medicine prescribed to McQuater on a nightstand.

In April 2015, the Los Angeles County Department of Children and Family Services (DCFS) removed defendant's daughters from her home because, as defendant explained to investigators, DCFS suspected defendant and McQuater had resumed living together. Defendant was arrested for interfering with her children's removal and spent two days in jail. During this time, defendant called McQuater multiple times using the jail's phone system. (Evidence of these recorded calls was admitted at trial, an issue we shall return to *post*.)

About three months before defendant shot McQuater, one of defendant's Palmdale neighbors, Nick Santana (Santana), saw defendant and another woman chasing McQuater with a machete at 2:00 a.m. Defendant yelled, "Somebody's going to fucking die here tonight."[3] Santana later discovered blood "all over [his] porch" and saw McQuater's arm "slinged up." Natasha Peterson (Peterson), who is McQuater's cousin, testified McQuater called her around that time and said defendant "cut him with an axe" and he was "bleeding a lot." Peterson saw McQuater, defendant, and their daughters about a week later at a Father's Day party. McQuater's arm was bandaged. McQuater's mother, Martin, also testified defendant admitted she cut McQuater's arm. McQuater did not report the incident to police.

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[3] Although Santana testified at trial that defendant wielded the machete, an investigator testified that Santana previously told him the other woman wielded the machete.

Just a few days before McQuater's death, defendant's mother, Lois Labba (Labba), testified defendant showed up at her house with a handprint on her face and bruises on her neck. Defendant later told investigators she sustained these injuries when McQuater broke into her house, threw her into a bathtub, and choked her. The same day, defendant called a probation office supervisor to report what happened (McQuater was on probation at the time). Defendant opted not to call the police because "the last time [she] called for help, they took [her] children from [her] like [she] was the one doing something wrong." According to defendant, McQuater subsequently called her and said, "Bitch, when I see you, I'm going to really choke your ass out this time."

B. Defendant's Account of the Killing

On September 4, 2015, McQuater was present at defendant's Palmdale home. Defendant was talking on the phone with Breaux when McQuater "startled" her and told her to "hang up the phone[ ] because we need to chop it up [i.e., talk]."

Over the course of about an hour, McQuater and defendant argued about their relationship and their children. Defendant told him they were not in a relationship and he was welcome to visit the children at her mother's house, where they had been staying since DCFS's intervention. The argument was sporadically physical. A chair in which defendant was seated was knocked over during a "tussle, pushing and shoving or whatever." Later, defendant was standing in the living room when McQuater "bumped" her and she "almost fell on the table," causing it to overturn.

With McQuater in the kitchen "fumbling with the knives," defendant got her handgun and said, "I need you to leave. You're not going to beat me today." McQuater said something defendant could not make out and called her a bitch. Defendant fired her gun once and McQuater ran out to the backyard.

From inside the house, defendant heard a sound suggesting McQuater had jumped a fence to leave. When defendant "peeked" through a sliding glass door to make sure McQuater was gone, McQuater "jumped back out" at her and she fired another shot. The bullet hit McQuater in the chest and he ran back through the house and out the front door shouting, "She attacked me again." Defendant stayed in the house. She did not call 911, but she placed the gun on a counter beneath a towel so police would not shoot her when they responded. She called her mother and sister. She picked up a bullet casing from the floor inside the house and put it in a trashcan, ostensibly so her dog would not eat it.

C. Evidence Undermining Defendant's Account of the Killing

A neighbor called the police when he saw McQuater in the street asking for help. As he provided first aid to McQuater on another neighbor's porch, McQuater told him, "My girl shot me."

One of the first law enforcement officers to arrive was deputy sheriff Gustavo Munoz. Deputy Munoz and other officers surrounded defendant's house and defendant walked outside after one of the other deputies addressed her through a loudspeaker. When Deputy Munoz handcuffed defendant and walked her to his patrol car, defendant told him McQuater "tried to assault her with a knife or something along those lines" and

she "shot his ass." Deputy Munoz characterized defendant's tone as more "annoyed" than frightened or angry.

LASD sergeant Frederick Reynolds and his partner, detective Eduardo Aguirre, arrived at defendant's house soon after the shooting. Sergeant Reynolds found defendant's gun on a kitchen counter beneath "some type of . . . cloth." There was no blood on the gun. After a brief walkthrough of the house, Sergeant Reynolds and Detective Aguirre left to take defendant's statement and the scene was processed by criminalists who also testified at trial.

Kirsten Fraser (Fraser), a senior criminalist with LASD, documented blood evidence at defendant's house. Fraser identified a trail of blood leading from the back patio, through the house, across the street to the front porch of a neighbor's house. Blood stains on the patio were disturbed and overlapping, suggesting movement. Inside the house, Fraser found blood on the chair defendant claimed was overturned before she shot McQuater. The blood was on the side of the chair that was against the floor, suggesting it was knocked over after the shooting. LASD sergeant Robert Martindale testified the overturned coffee table was too heavy and wide, and had feet offering too little friction, "to support the [claim] that it was knocked over" spontaneously.

LASD senior criminalist Amanda Davis (Davis) collected and analyzed ballistics evidence in and around the house. Inside the house, Davis identified bullet strike marks suggesting a bullet was fired into the floor and ricocheted into a desk. She opined that, based on these strike marks, she expected to find a bullet near the desk. Instead, she found a bullet in another room (the kitchen) where there was no evidence of a bullet striking

anything—suggesting it might have been moved. Outside the house, investigators discovered a single bullet hole in a fence around a corner from the sliding door where defendant claimed she shot McQuater.[4] One of the pickets on this fence was broken.[5] A medical examiner opined McQuater was shot once from less than two feet away, with the bullet entering his chest about 11 inches from the top of his head and exiting through his back at a downward angle. The hole in the fence was at a height consistent with this trajectory.

D. Expert Testimony Regarding IPB and Its Effects

During the defense case, counsel called Dr. Nancy Kaser-Boyd to testify as an expert on IPB and its effects. Among other things, Dr. Kaser-Boyd explained "[t]he cardinal feature of [IPB] is leaving and going back, leaving and going back. So there is an inability to separate from this person for a variety of reasons."

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[4] Davis acknowledged the hole in the fence tested negative for copper and lead residue, but she testified this did not undermine her conclusion, upon visual inspection, that the hole was a bullet hole. No corresponding bullet, however, was found in the backyard.

[5] The prosecution's theory at trial was that McQuater attempted to jump over the fence, failed because the picket broke, and then found himself cornered by defendant—who shot him. A defense expert in bloodstain pattern analysis proffered a contrary theory: McQuater was shot at the sliding door in a crouching position based on the lack of blood on the fence and the presence of blood she identified as "back spatter" on the sliding door. A pathologist retained by defendant to review McQuater's autopsy report testified methamphetamine in McQuater's system would have made him irrational and aggressive.

She described a study concerning the "cycle of violence" in which victims of IPB often find themselves trapped: "[T]he violence was never constant, and so there would be a first stage that involved escalating tension or maybe just little spats, and then after a period like that, there would be an explosion of anger and that was where the battering happened. [¶] And then after the battering, there was an attempt to make nice . . . ; apologizing, asking if they could go to therapy, sending flowers, just basically trying to make it better. [¶] [The] last part of the cycle was what kept many battered women in the relationship because they truly felt their partner wanted to be different." Based on various tests, Dr. Kaser-Boyd believed defendant had suffered "pretty severe domestic violence with [McQuater]."

Defense counsel posed a hypothetical question to Dr. Kaser-Boyd intended to track the facts as related in defendant's statements to investigators, i.e., that an abused woman went to a sliding door to confirm her batterer had left and "the man involved jumped or lunged towards her from [a] concealed area of the yard" before the woman fired a gun. Dr. Kaser-Boyd opined the woman described in this hypothetical would have been suffering the effects of IPB at the time of the shooting and "very likely . . . would have experienced her life being in danger."

E. Instructions, Verdict, and Sentencing

In addition to the elements of the charged murder offense, the trial court instructed the jury on the elements of the lesser included offense of voluntary manslaughter, principles of self-defense, and the purposes for which they could consider Dr. Kaser-Boyd's testimony regarding IPB and its effects.

The jury found defendant guilty of second-degree murder and found true an associated personal discharge of a firearm sentencing enhancement (Pen. Code, § 12022.53, subd. (d)). The court sentenced defendant to 40 years to life: 15 years to life for the murder conviction and a consecutive term of 25 years to life for the firearm enhancement.

II. DISCUSSION

Defendant raises a litany of asserted errors. We hold there were no trial errors but remand to give the trial court the opportunity, if it so chooses, to exercise newly conferred sentencing discretion. We summarize our rationale, and we elaborate thereafter.

Defendant contends the trial court's IPB jury instruction was deficient because it did not identify all of the purposes for which the jury could consider this evidence, including assessing defendant's credibility. The law does not require the specific instructional language defendant proposes, however, and it would not have materially changed the meaning of the instruction the trial court gave.

Defendant argues the trial court should have excluded testimony concerning defendant's involvement in the prior machete or axe attack on McQuater because the statute the court relied on to admit the testimony, Evidence Code section 1109 (making other acts of domestic violence admissible), is unconstitutional. California cases have rejected similar constitutional challenges, as do we. And with regard to the merits of the evidentiary ruling, the trial court correctly ruled the testimony admissible: evidence that defendant chased down and seriously wounded McQuater months before the shooting is

highly probative of her state of mind when she shot McQuater and not unduly prejudicial.

Defendant contends the trial court abused its discretion in admitting two calls defendant made to McQuater from jail in April 2015 (five months before the murder when defendant was briefly incarcerated following DCFS's removal of her children) because the calls were unduly prejudicial to such a degree as to substantially outweigh any probative value. There was little risk of undue prejudice from the two calls, however, and they provide direct insight into the nature of defendant's interactions with McQuater. In the same vein, the trial court did not err in partially rejecting the defense request to admit more of the jail calls. The calls (or portions of calls) the trial court excluded would not have significantly added to the extensive evidence admitted that suggested defendant and McQuater were involved in an abusive or controlling relationship. Moreover, the excluded calls included highly prejudicial features, including discussion of a social worker's findings and defendant crying about her children.

Defendant argues the trial court abused its discretion in excluding a portion of the recording of her first interview with sheriff's department investigators that memorialized her emotional reaction to news of McQuater's death. The argument, however, is premised on the incorrect view that the rule of completeness prevents a trial court from excluding such highly prejudicial material pursuant to Evidence Code section 352 (Section 352).

Defendant contends the trial court erred in permitting the prosecution to present a home video in which defendant and McQuater played happily with their daughters in its rebuttal

case, rather than its case-in-chief. We conclude the trial court was within its discretion to permit the video to be played in rebuttal, and regardless, it is not reasonably probable the video clip impacted the jury's verdict.

Having concluded there was no reversible error, we shall affirm defendant's murder conviction. But we will remand the case to permit the trial court to decide whether to exercise its discretion to strike the personal discharge of a firearm enhancement.

A. The Trial Court Correctly Instructed on IPB with CALCRIM No. 851 and Was Not Required to Give CALJIC No. 9.35.1 Instead

Defendant contends the trial court's IPB jury instruction, which was drawn from the Judicial-Council-Approved CALCRIM No. 851, was inadequate because it does not properly delimit all of the purposes for which a jury can consider IPB evidence when considering imperfect self-defense (see generally *Humphrey*, *supra*, 13 Cal.4th at p. 1082 ["For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. [Citation.] If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter"]).

In *Humphrey*, a case discussing how IPB evidence may be used, our Supreme Court held juries should be instructed that such evidence may be considered in assessing both whether the defendant subjectively believed in the need for self-defense and whether that belief was reasonable. (*Humphrey*, *supra*, 13 Cal.4th at p. 1087.) The *Humphrey* court also observed that

"[b]attered women's syndrome was also relevant to [the] defendant's credibility" in that case because "[i]t 'would have assisted the jury in objectively analyzing [the] claim of self-defense by dispelling many of the commonly held misconceptions about battered women' . . . . [and] '"would help dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time. . . . ."' [Citation.]" (*Ibid*.)

Here, the trial court instructed the jury adhering closely to the CALCRIM No. 851 pattern instruction,[6] which does not make express reference to a defendant's credibility: "You have heard testimony from Nancy Kaser[-]Boyd regarding the effect of intimate partner battering. [¶] Nancy Kaser[-]Boyd's testimony about intimate partner battering is not evidence that the defendant committed any of the crimes charged against her. [¶] You may consider this evidence only in deciding whether the

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[6] CALCRIM No. 851 provides as follows: "You have heard testimony from _____ <insert name of expert> regarding the effect of (battered women's syndrome/intimate partner battering . . .). [¶] [The expert's] testimony about (battered women's syndrome/intimate partner battering . . .) is not evidence that the defendant committed any of the crimes charged against (him/her). [¶] You may consider this evidence only in deciding whether the defendant actually believed that (he/she) needed to defend (himself/herself) against an immediate threat of great bodily injury or death, and whether that belief was reasonable or unreasonable. [¶] When deciding whether the defendant's belief was reasonable or unreasonable, consider all the circumstances as they were known by or appeared to the defendant. Also consider what conduct would appear to be necessary to a reasonable person in a similar situation with similar knowledge."

defendant actually believed that she needed to defend herself against an immediate threat of great bodily injury or death, and whether that belief was reasonable or unreasonable. [¶] When deciding whether the defendant's belief was reasonable or unreasonable, consider all the circumstances as they were known by or appeared to the defendant. Also consider what conduct would appear to be necessary to a reasonable person in a similar situation with similar knowledge."

Defendant faults the court's instruction because, unlike CALJIC No. 9.35.1,[7] the court's instruction does not expressly tell

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[7] CALJIC No. 9.35.1 provides, as relevant to the issue we decide here: "Evidence has been presented to you regarding intimate partner battering and its effects. . . . [¶] . . . [¶] You should consider this evidence for certain limited purposes only, namely,

[that the [alleged victim's] [defendant's] reactions, as demonstrated by the evidence, are not inconsistent with [her] having been physically abused] [, or]

[the beliefs, perception or behavior of victims of domestic violence] [, or]

[proof relevant to the believability of the defendant's testimony] [, or]

[whether the defendant . . . committed the crime of _____] [, or]

[whether the defendant actually believed in the necessity to use force to defend herself against imminent peril to life or great bodily injury and if so, whether that belief was unreasonable.] [¶] . . . [¶]

[Whether the defendant . . . acted under [duress] [threats and menaces] that [was] [were] sufficient to cause a reasonable person to fear that [his] [her] life was in immediate danger if [he] [she] did not engage in the conduct charged, and the

jurors that IPB evidence could be considered to assess her credibility and whether her conduct was consistent with that of a victim of domestic violence.[8] According to defendant, the CALCRIM and CALJIC "differ[ ] dramatically" and she believes the jury in her case would have been unaware it could use the IPB-related testimony (1) to assess whether her "'reactions . . . [were] not inconsistent with [her] having been physically abused,'" (2) in contextualizing the "'beliefs, perception or behavior of victims of domestic violence,'" or (3) as "'proof relevant to the believability of the defendant's testimony.'"

We are not persuaded that, having instructed the jury they could consider IPB evidence in "deciding whether the defendant actually believed that she needed to defend herself against an immediate threat of great bodily injury or death," the court was

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defendant . . . actually believed that [his] [her] life was so endangered.]

[Whether the defendant . . . had formed the [mental state] [or] [specific intent] required for the charged [offense[s]] [or] [special circumstance[s]].]"

[8] Defense counsel did not object to the trial court's decision to instruct with CALCRIM No. 851. Generally, we review an instruction to which the defendant did not object in the trial court only if the instruction incorrectly states the law (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012) or affects the defendant's substantial rights (Pen. Code, § 1259; *People v. Scott* (2015) 61 Cal.4th 363, 400). Here, defendant contends the IPB instruction given was incomplete. Although there is authority suggesting an argument for "modification of [an] instruction rather than [its] complete rejection" is subject to forfeiture (*People v. Mackey* (2015) 233 Cal.App.4th 32, 106), we opt to explain why defendant's argument fails on the merits.

required to enumerate, sua sponte in its instruction, specific ways in which the jury might use the IPB evidence to make that decision. The applications of IPB evidence in assessing a defendant's subjective beliefs are sufficiently obvious that they need not be spelled out in every case. (Cf. *People v. Diaz* (2015) 60 Cal.4th 1176, 1192 [""an instruction that tells the jury what kinds of rational inferences may be drawn from the evidence does not provide any insight jurors are not already expected to possess""].) We fail to see how a juror could follow the given instruction and consider IPB evidence in assessing defendant's subjective beliefs *without* determining whether defendant's conduct was consistent with the cycle of violence described by Dr. Kaser-Boyd and considering how defendant's experience of abuse colored her perceptions and her statements to investigators.

To be sure, the CALJIC instruction is longer and more detailed, but as Ambassador Clare Boothe Luce once observed, "the height of sophistication is simplicity." (Brokaw, Stuffed Shirts (1971) p. 239.) The CALCRIM instruction and the trial court's adaptation thereof permitted the jury to make use of the IPB evidence in precisely the manner in which defendant would have it, albeit in fewer words, and no one contended during closing argument that the IPB evidence could not be used to assess defendant's credibility or to determine whether she acted in imperfect self-defense—indeed, quite the opposite. While CALJIC No. 9.35.1 does incorporate language in *Humphrey* that explains how IPB evidence is relevant to a self-defense claim, nothing in the *Humphrey* opinion itself supports defendant's contention that jury instructions *must* include this language.[9]

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[9] Compare, for example, defendant's contention that "*Humphrey* made clear that jurors should be instructed to

Rather, the Supreme Court explained in *Humphrey* how a juror might naturally apply evidence of IPB and its effects in assessing a defendant's subjective beliefs. It did not prescribe the parameters of a pattern instruction or mandate use of an instruction formulated as CALJIC No. 9.35.1 rather than as CALCRIM No. 851.

We address one further point made by defendant on this score. She spotlights language in CALJIC No. 9.35.1 that tells a jury considering IPB evidence to "take 'an approach that is completely different' than in other murder cases" and argues the instruction the trial court gave should have so stated. The argument fails because it divorces the quoted language from its context in the CALJIC pattern instruction. In context, the "completely different" approach language is included in CALJIC No. 9.35.1 only to explain scientific research concerning IPB and its effects—particularly that such research "is based upon an approach that is completely different from" a jury's determination of whether the prosecution has met its burden of proof. Indeed, as explained in the use notes for CALJIC No. 9.35.1, the paragraph in which this language appears should be used only if

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consider that the IPB evidence 'dispel[s] the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time' so that '[p]opular misconceptions about battered women would be put to rest'" with the actual text of *Humphrey*: "Battered women's syndrome evidence was also relevant to defendant's credibility. It 'would have assisted the jury in objectively analyzing [defendant's] claim of self-defense by dispelling many of the commonly held misconceptions about battered women.' [Citation.]" (*Humphrey*, *supra*, 13 Cal.4th at p. 1087.)

the prosecution introduces the evidence and "should be deleted" if, as here, IPB evidence is offered by the defendant. Defendant's argument thus runs directly contrary to the CALJIC use notes and the thrust of the pattern instruction: Juries considering IPB evidence are not to take an approach "completely different" from juries in criminal cases where such evidence is not presented; they are to take the same general approach to determining guilt or not, which is "completely different" from the "research approach" of IPB experts.

B. Testimony Regarding the Uncharged Machete/Axe Attack was Properly Admitted

Defendant contends the trial court erred in admitting testimony that defendant attacked McQuater with a machete or axe before the murder, in the summer of 2015.[10] The key testimony in this regard was: neighbor Santana's statement that he saw defendant chasing McQuater with a machete and heard her yelling "[s]omebody's going to fucking die here tonight"; Peterson's testimony that her cousin McQuater called early one morning to tell her defendant "cut him with an axe"; and

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[10] In his respondent's brief, the Attorney General mistakenly dates this incident as having occurred in June 2014, rather than 2015. Although defendant's opening brief uses the correct year, defendant's reply brief cites the Attorney General's brief to claim the attack occurred "15 months" prior to the shooting. The record is best read to establish the attack occurred in 2015: Peterson unambiguously stated McQuater called her on June 14, 2015, and Santana testified the attack occurred "about three months" before the shooting.

testimony from Martin, McQuater's mother, that defendant admitted she cut McQuater's arm.

For the reasons we will now discuss, defendant's due process and equal protection challenges to Evidence Code section 1109 (Section 1109), the statute that permits the aforementioned character evidence, are unavailing. Nor are we persuaded the trial court abused its discretion in determining that the prior uncharged act evidence was relevant and any risk of undue prejudice did not outweigh the evidence's probative value.

1. Section 1109 is constitutional on its face

Evidence Code section 1101 sets forth the general rule that "evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specific occasion." (Evid. Code, § 1101, subd. (a).) Section 1109 carves out exceptions to the general ban on character evidence in cases involving domestic violence (subdivision (a)(1)), abuse of an elder or dependent person (subdivision (a)(2)), and child abuse (subdivision (a)(3)). Subdivision (a)(1), applicable here, provides in pertinent part that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by [Evidence Code] Section 1101 if the evidence is not inadmissible pursuant to Section 352." In other words, "evidence of a prior act of domestic violence is admissible to prove the defendant had a propensity to commit domestic violence when the defendant is charged with an offense involving domestic violence. The trial court has discretion to exclude the evidence if its probative value is outweighed by a danger of undue prejudice

or confusing the jury, or would result in an undue consumption of time." (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1114.)

Defendant contends Section 1109 violates due process because such character evidence permits jurors to convict without "determin[ing] the truth of every element of the crime charged." "In the due process context, defendant must show that [the statute] offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. [Citations.] The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. [Citations.]" (*People v. Falsetta* (1999) 21 Cal.4th 903, 913 (*Falsetta*).) As defendant recognizes, courts have consistently rejected due process challenges to Section 1109 based on our Supreme Court's rejection of a similar challenge to Evidence Code section 1108 (Section 1108) in *Falsetta*. (*People v. Cabrera* (2007) 152 Cal.App.4th 695, 704 [collecting cases]; accord *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310 ["In short, the constitutionality of section 1109 under the due process clauses of the federal and state constitutions has now been settled"] (*Jennings*); *People v. Johnson* (2010) 185 Cal.App.4th 520, 529 ["The Courts of Appeal . . . have uniformly followed the reasoning of *Falsetta* in holding section 1109 does not offend due process"].)

Defendant urges us to break with the line of cases extending *Falsetta* to Section 1109 on the grounds that Section 1109 is distinguishable from Section 1108. We decline. Neither Section 1108 nor Section 1109 suggests prior commission of a sex crime or domestic violence is alone sufficient to support a conviction for the charged crime, and we see no basis to avoid *Falsetta*'s rationale here.

Defendant also contends Section 1109 "violates equal protection because it treats those accused of a crime that happened to take place between domestic partners differently from those accused of other crimes." "An equal protection challenge to a statute that creates two classifications of accused or convicted defendants, without implicating a constitutional right, is subject to a rational-basis analysis." (*People v. Fitch* (1997) 55 Cal.App.4th 172, 184 (*Fitch*); see also *People v. Turnage* (2012) 55 Cal.4th 62, 74 (*Turnage*).) Defendant again acknowledges her argument has been rejected in published caselaw. (*Fitch*, *supra*, at p. 184 [rejecting equal protection challenge to Section 1108 because the "seriousness and . . . secretive commission" of sex offenses provide a rational basis for treating propensity evidence relevant to sex offenses different from propensity evidence generally]; *Jennings*, *supra*, 81 Cal.App.4th at p. 1311 [*Fitch* "analysis applies with equal force to the admission of evidence of a defendant's commission of other acts of domestic violence under section 1109"]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1332-1334 [*Falsetta* rationale forecloses due process challenge to Section 1109].) We agree that the circumstances in which domestic violence often occurs dissuade victims from reporting and pose special problems for the prosecution of those offenses that are reported. (*Jennings*, *supra*, at p. 1313.) McQuater did not, after all, report the machete/axe incident, and nobody witnessed the shooting. There is a rational basis for Section 1109's exception to the general rule against propensity evidence in domestic violence cases.

2. Section 1109 is constitutional as applied and the trial court's evidentiary ruling was within its discretion

An as-applied challenge to a facially valid statute is one that requires analysis of the facts of the particular case to determine whether the statute has been applied to the defendant in violation of a protected right. (*In re Taylor* (2015) 60 Cal.4th 1019, 1039.) Here, defendant contends the admission of irrelevant and prejudicial evidence violated her due process rights (*Falsetta*, *supra*, 21 Cal.4th at p. 913) and constituted an abuse of the trial court's discretion under Evidence Code sections 350 and 352. Citing *People v. Linkenauger* (1995) 32 Cal.App.4th 1603 (*Linkenauger*) and *Jennings*, *supra*, 81 Cal.App.4th 1301, defendant contends testimony regarding the machete/axe attack was not relevant because a "one-off" attack does not demonstrate a pattern or propensity to engage in domestic violence. She also contends the evidence is more prejudicial than probative because the jury would have been inclined to punish her for the prior uncharged conduct, Santana did not see the attack, and Peterson's testimony was based on hearsay.

As to defendant's relevance argument, nothing in *Linkenauger*, *Jennings*, or the text of Section 1109 suggests a single prior incident of abuse cannot establish a propensity to commit domestic violence. Courts routinely affirm convictions in cases in which evidence of a single prior incident of domestic violence was admitted under Section 1109. (See, e.g., *People v. Culbert* (2013) 218 Cal.App.4th 184, 191-193 [evidence of a single prior instance in which the defendant threatened a family member admissible "[g]iven the similarities between the two incidents and the prior incident's relevance in proving appellant's

intent and [victim's] reasonable fear"]; *People v. Morton* (2008) 159 Cal.App.4th 239, 242, 245-248 [evidence of a single prior incident in which the defendant abused another girlfriend admissible because prior incident "bore significant similarities" to charged incident "and the fact that it was unprovoked—rather than provoked as [defendant] contend[ed the charged] incident was—made it germane to [defendant's] claim of self-defense"]; *People v. Price* (2004) 120 Cal.App.4th 224, 239-241 [affirming conviction in case in which the trial court admitted evidence of a single prior instance of domestic violence and excluded evidence of three other instances of domestic violence].) The trial court did not abuse its discretion in determining testimony concerning the machete/axe attack was relevant.

As for defendant's prejudice contention, she relies on *People v. Tran* (2011) 51 Cal.4th 1040 (*Tran*) to argue the prejudicial effect of evidence of other bad acts is increased if the uncharged acts did not result in a criminal conviction. (*Id.* at p. 1047.) In *Tran*, our Supreme Court highlighted two ways in which a defendant might be prejudiced by such evidence: "[T]he jury might be inclined to punish the defendant for the uncharged acts regardless of whether it considers the defendant guilty of the charged offense and . . . the absence of a conviction increases the likelihood of confusing the issues, in that the jury will have to determine whether the uncharged acts occurred. [Citation.]" (*Ibid.*) The Court also explained, however, that "[t]he potential for prejudice is decreased . . . when testimony describing the defendant's uncharged acts is no stronger or more inflammatory than the testimony concerning the charged offense." (*Ibid.*) Here, although the machete/axe attack was serious, the relevant

testimony was no stronger or more inflammatory than the evidence relating to McQuater's death.

Further, any moderate risk of undue prejudice did not substantially outweigh the probative value of Santana's, Peterson's, and Martin's testimony. Evidence that defendant attacked McQuater with a deadly weapon just months before the shooting under circumstances that did not necessitate self-defense tends to undermine defendant's claim that she shot McQuater in self-defense. (See *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1029 ["Particularly in view of the fact that the subject evidence involved defendant's history of similar conduct against the same victim, the evidence was not unduly inflammatory"].)

Defendant suggests Santana's testimony has little probative value because he did not "actually see [defendant] strike McQuater with the machete." But Santana testified he observed nearly everything *but* defendant actually cutting McQuater: He saw defendant holding a machete in the street at 2:00 a.m., heard McQuater call for help, heard defendant threaten McQuater, found blood on his porch the next morning, and saw McQuater's arm in a sling days later. The conclusion that defendant attacked McQuater admittedly requires an inference from Santana's testimony, but the inference is a strong and reliable one.

Defendant also contends Peterson's testimony has little probative value because it is based on hearsay admitted as a spontaneous statement. (Evid. Code, § 1240.) The court did not abuse its discretion in believing otherwise. Peterson's testimony was substantially corroborated by two other witnesses and her

close relationship with McQuater provided a ready explanation for why he would call her after the attack.

C. The Trial Court Correctly Instructed the Jury on How It Should Consider the Uncharged Machete/Axe Attack Evidence

The trial court gave the following jury instruction, based on CALCRIM No. 852A, regarding evidence of uncharged domestic violence: "The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically: Intimate Partner Battery Causing Injury. [¶] *Domestic violence* means abuse committed against an adult who is a person with whom the defendant has a child. [¶] *Abuse* means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit Murder, as charged here. If you conclude that the

defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Murder or Manslaughter. The People must still prove each charge and allegation beyond a reasonable doubt."

Defendant contends this instruction is flawed because it does not define the elements of intimate partner battery causing injury and because it suggests the jury could "convict [defendant] of murder if they found, by a preponderance of the evidence, that appellant committed" uncharged domestic violence. Defendant did not raise these (or any other) objections to the instruction at trial, but they are meritless in any case.

The trial court was not required to list the elements of intimate partner battery causing injury because there was no need for the jury to find these elements satisfied in order to consider evidence of uncharged domestic violence. The instruction defined the term "domestic violence" and made clear that the jury could consider evidence of uncharged domestic violence "only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence." There was no suggestion the jury could or should consider whether defendant's conduct satisfied the elements of intimate partner battery causing injury.[11]

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[11] The reference to intimate partner battery causing injury fills a blank in CALCRIM No. 852A directing the court to "*insert other domestic violence alleged*." As explained in the bench notes to CALCRIM No. 852A, the sole purpose of this line is to distinguish evidence of uncharged domestic violence from "evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment . . . . If the court has not admitted any felony convictions or

In addition, the instruction does not suggest the jury could convict defendant of murder based solely on a finding, by a preponderance of the evidence, that she engaged in uncharged domestic violence. To the contrary, it states that a prior act of uncharged domestic violence "is not sufficient by itself to prove that the defendant is guilty of Murder or Manslaughter" and it emphasizes "[t]he People must still prove each charge and allegation beyond a reasonable doubt." (*People v. Reyes* (2008) 160 Cal.App.4th 246, 252-253; see generally *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*).) Despite defendant's insistence that there are "significant differences" between the instruction given in this case and the instruction given in *Reliford*, she identifies none that are material to our analysis.

D. The Trial Court Did Not Abuse Its Discretion in Admitting Recordings and Transcripts of Defendant's Jail Calls to McQuater

The prosecution offered redacted audio recordings and transcripts of two calls defendant made to McQuater in April 2015 when she was briefly incarcerated following DCFS's removal of their daughters from the Palmdale home. The prosecution contended the calls belied defendant's statements to

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misdemeanor conduct for impeachment, then, in the first sentence, the court is not required to insert a description of the conduct alleged." Because no such impeachment evidence was admitted, the court need not have included the reference to intimate partner battery causing injury at all. As explained *ante*, however, the inclusion of this language did not affect the instruction's meaning.

investigators that she feared McQuater and wanted to avoid him (by moving to Palmdale).

In the first call, defendant identifies herself as "Angel" and asks McQuater to "get to the house as soon as possible," arrange for $100,000 bail, and call defendant's mother to pick up their kids. In the second call, defendant again identifies herself as "Angel"; describes conditions in the jail; discusses how she and McQuater miss their daughters; and, when McQuater says "I love you" at the end of the call, responds, "I love you too."[12] Sergeant Reynolds testified that all jail calls are maintained in a database called Inmate Telephone Monitoring System (ITMS). Sergeant Reynolds further explained that inmates are required to dial their booking number before placing a call and investigators may retrieve call recordings from ITMS by searching an inmate's name or booking number.

Defendant contends the call recordings and transcripts were not properly authenticated because there was no affidavit or live testimony explaining how the calls were recorded or transcribed, Sergeant Reynolds did not testify he personally downloaded the recordings, and there were no phone logs showing the recordings were linked to defendant's booking number. Defendant likens the recordings to cell phone location data (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1023) and rap sheets (*People v. Matthews* (1991) 229 Cal.App.3d 930, 940), and suggests they can only be authenticated if the foundational requirements of the business records exception to the hearsay

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[12] The recordings and transcripts were redacted to exclude cumulative material and certain other irrelevant or unduly prejudicial information.

rule are satisfied. (Evid. Code, § 1271.) This is not, however, the standard for authentication of an audio recording. (See *People v. Dawkins* (2014) 230 Cal.App.4th 991, 1002-1003 [challenge to trial court's ruling on authentication of audio recording did not concern "rulings on the audio recording's admissibility under the rules concerning hearsay, except insofar as the trial court may have conflated the foundation for the admission of a business record ([Evid. Code,] § 1271) with the requirements for authenticating a document"] (*Dawkins*).)

Evidence Code section 403, subdivision (a)(4) provides that the party proffering evidence of a statement made by a particular person has the burden to produce sufficient evidence to establish the preliminary fact that the person made the statement. In other words, a party proffering an audio recording has the burden to show "it is a reasonable representation of that which it is alleged to portray." (*Dawkins*, *supra*, 230 Cal.App.4th at p. 1002.) "'As long as the evidence would support a finding of authenticity, the [evidence] is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' [Citation.]" (*People v. Goldsmith* (2014) 59 Cal.4th 258, 267.)

Here, defendant was jailed for her conduct when DCFS removed her children from her home and the recordings feature a speaker who identifies herself as Angel calling a man to discuss their children being removed from their home. This is sufficient evidence to support the trial court's decision to allow the jury to infer the calls feature defendant speaking with her children's father, McQuater.

Defendant also contends the prejudicial impact of the call recordings and transcripts substantially outweighed their

probative value. With respect to prejudice, defendant contends the recordings include obscene language and reveal both that her children were taken away and that she was "incarcerated for committing a crime that was so serious her bail was $100,000." The jury knew, however, based on defendant's statements to investigators, that her children were taken away and she had been arrested at least once before. Nor was it news to the jury that defendant used profanity—they had already heard Santana's far more inflammatory testimony about defendant yelling "[s]omebody's going to fucking die here tonight." Regardless, the prejudicial impact of such language does not outweigh the probative value of the impeachment evidence. (See *People v. Hines* (1997) 15 Cal.4th 997, 1044 [trial court did not abuse its discretion in admitting recording of jail conversation impeaching defendant's trial testimony despite his "constant use of obscenities through the conversation"].)

Defendant contends the calls have little probative value because they demonstrate "that she was incarcerated and grateful she could talk to someone who could keep her children safe." But it is untrue (and there is no indication defendant actually believed) McQuater was "the only person who could keep the police from taking them away." As defendant explained to investigators, DCFS removed the children "because they said they feared for [defendant] and [her] children[ ] because of [McQuater]." Even if McQuater was uniquely situated to obtain information about the children from DCFS and/or foster parents, the recorded conversations are not limited to discussions of the children's status. Defendant asks McQuater to call her mother and ask her to find the children during the first of the two calls played for the jury, but the children only come up in the second

call when McQuater mentions he had a dream about them. Other topics discussed during the second call range from the number of women in defendant's cell to what McQuater was eating. Even if these calls do not establish defendant and McQuater had a loving or healthy relationship, they are probative of defendant's feelings toward McQuater and the manner in which they related to one another.

E. The Trial Court Did Not Abuse Its Discretion in Excluding Other Jail Calls Between Defendant and McQuater

Based on the trial court's admission of the two jail calls offered by the prosecution, defense counsel sought to introduce recordings of four additional jail calls that, in her view, demonstrated the "cycle of violence" described by Dr. Kaser-Boyd. Defendant contends the trial court abused its discretion in ordering redactions to one of the calls and excluding two of the others.

The first call (Call One) features McQuater reading a report (presumably by a DCFS social worker) referring to a "[v]ery high risk [of] domestic violence," suggesting "you guys were going to reunite," and stating that defendant had a restraining order against McQuater. When defendant asks McQuater to clarify a point, McQuater tells her, "Just listen to me. You gotta catch up to me. Catch up to me." When defendant repeats the question, McQuater says, "Listen, just listen." Balancing the call's probative value against the risk of distracting and confusing the jury under Section 352, the trial court ordered defense counsel to redact the portions of the call

mentioning a high risk of domestic violence and suggesting "you guys were going to reunite."

In Call Two, defendant cries as McQuater tells her about their daughters spending Easter with a foster parent. McQuater tells defendant, "[D]on't cry, baby. It's okay. I love you, man. Alright?" As defendant continues to cry, McQuater says, "It's alright baby. Our babies is okay. You hear me? They okay right now." The recording ends with McQuater telling defendant he learned that "most likely the court is going to release the kids" and "the only reason they really came and did that [i.e., removed the children] was because [defendant was] a little intoxicated . . . ." Defendant cries and McQuater again says, "Baby, don't cry, man. Damn. That's, don't cry. Just listen to me. She was trying to tell me propaganda." The trial court excluded this call because it is "particularly emotional," focuses on the children, and "[t]here [was] no evidence before the jury to support that she didn't care about her kids."

In Call Four,[13] McQuater tells defendant to call him back so he can "put some minutes on the phone." When defendant tells him she will call the next morning, he responds, "You've got to call back tonight so I can get some minutes on the phone. You gonna get up early and be in court. You ain't gonna . . . . Call me tonight. Call me. Call me back when this phone hang up to see how many minutes on the phone." The trial court excluded this call as cumulative, explaining Calls One and Three were

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[13] The prosecution did not object to Call Three, in which defendant tells McQuater she is glad she memorized his phone number because she does not know any others.

sufficient to achieve defense counsel's goal of "present[ing] a complete picture to the jury."

Defendant contends she was denied due process because the exclusion of Calls Two and Four and part of Call One deprived her of a meaningful opportunity to present a complete defense. According to defendant, the trial court's exclusion of these jail calls and part of defendant's interview with LASD investigators (discussed *post*) "eviscerated the defense that she stayed with McQuater, even though he was getting more and more violent, because she was suffering from IPB and PTSD and killed him because he was going to kill her."

Pursuant to established authority, we reject defendant's federal constitutional framing of her argument. (*People v. Buenrostro* (2018) 6 Cal.5th 367, 400; *People v. Quartermain* (1997) 16 Cal.4th 600, 626 [exclusion of evidence does not deny due process unless it renders trial fundamentally unfair].) And as to the merits of the argument as a matter of state evidentiary law, we are not persuaded the excluded material was significantly probative—especially in the context of a trial in which several witnesses testified about McQuater's abusive conduct and it was stipulated that he was twice convicted of inflicting injury on an intimate partner.

Defendant offers no basis for her claim that the redactions to Call One "change[d] what was being said." At trial, defense counsel observed that the unredacted call demonstrated "[McQuater] talking for quite a while and [defendant] remaining silent, just listening" and argued the jury should "hear him talking for a while, experience that in realtime." It is true that the court-ordered redactions exclude some of McQuater's rambling interpretation of the DCFS social worker's report.

Nonetheless, defendant was able to play audio of McQuater cutting defendant off and twice telling her to "just listen."

Defendant's theory that Call Two should have been admitted because it "'supports the defense theory of domestic violence and that [defendant] is battered' because McQuater told her, 'don't cry baby[,] I love you'" is similarly unavailing. McQuater's efforts to console defendant in traumatic circumstances obviously do not prove that he did *not* abuse and manipulate her, but they do little to show that he did. Plus, the trial court rightly reasoned that defendant's sobbing throughout the call in regard to her children would be quite prejudicial—potentially playing on the jury's sympathies—without any appreciable relevance to a fact in issue that the jury must decide.

Finally, in Call Four, although McQuater takes an insistent tone with defendant when discussing when she should next call him, he exhibits the same tone when telling defendant to "just listen" in Call One. Call One amply demonstrates that McQuater's efforts to assert control over defendant could be subtle. The trial court did not abuse its discretion in concluding that the risks of undue consumption of time, confusion, and prejudice substantially outweighed the value of additional examples of this relationship dynamic.

None of the cases defendant cites to argue the contrary undermine the trial court's Section 352 balancing. (*Humphrey*, *supra*, 13 Cal.4th 1073; *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057 (*DePetris*); *United States v. James* (9th Cir. 1999) 169 F.3d 1210 (*James*).) In *Humphrey*, the trial court erred in instructing the jury that evidence of battered women's syndrome is not relevant to the reasonableness of a defendant's belief in the need to kill in self-defense. (*Humphrey*, *supra*, at pp. 1088-1089.)

Because the trial court in this case did not categorically exclude evidence of McQuater's abusive and manipulative conduct, *Humphrey* has no bearing on the issue before us. In *DePetris*, the trial court abused its discretion in excluding a journal kept by the defendant's husband—which she had read—because the journal provided impartial corroboration (unlike testimony from the defendant's family and a friend) that she genuinely feared her husband. (*DePetris*, *supra*, at pp. 1063-1064.) Here, in addition to friends and family (Hamm, Harrison, Labba, and Breaux) testifying that McQuater beat defendant, the parties stipulated McQuater had two domestic violence convictions, Crisp testified that McQuater severely beat her when they dated, and even McQuater's mother, Martin, conceded she once saw defendant with a black eye. Thus, unlike the journal in *DePetris*, the excluded jail calls were not essential to corroborate defendant's claim that McQuater abused and manipulated her. Finally, in *James*, the Ninth Circuit reversed a conviction for aiding and abetting manslaughter because the trial court excluded police records that corroborated defendant's testimony about her boyfriend's boasts of violent behavior. (*James*, *supra*, at pp. 1214-1215.) Again, the case before us featured extensive evidence of McQuater's abusive tendencies from impartial sources. McQuater's tone in the excluded jail calls had little if anything probative to add.

F. The Trial Court Did Not Abuse Its Discretion in Excluding Portions of Defendant's Interviews with LASD Investigators

Recordings of defendant's interviews with sheriff's department investigators were not played in full. Among other

things, the jury did not hear defendant's emotional reaction, at the end of the first interview, to the news that McQuater was dead.[14] At trial, defense counsel argued that playing other portions of the interview but omitting defendant's reaction to news of McQuater's death would give the jury the "false impression that [defendant] [seemed] not to care that she fired a fatal shot . . . ." Defense counsel argued defendant's reaction to news of McQuater's death must be admitted under the rule of completeness, codified at Evidence Code section 356 (Section 356).

Section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it understood may also be given in evidence." "'The purpose of this section is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.' [Citations.]" (*People v. Pearson* (2013) 56 Cal.4th 393, 460.) "Thus, '"'[i]n the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such

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[14] When Sergeant Reynolds told defendant McQuater was dead, she responded, "Hurt my children. I didn't want to do that. (crying.) Oh my God. Oh my God, no. I (inaudible). No, no, no, no. Oh God. Oh my God. I can't explain it to my children. Oh my God, oh my God, oh my God, oh my God, oh my God. Oh my God."

conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence.'"'" [Citation.]" (*People v. Brooks* (2017) 3 Cal.5th 1, 49-50 (*Brooks*).)

Announcing its tentative ruling, the trial court explained that defendant's reaction to McQuater's death "does not come within [Section] 356" because "[i]t is a wholly self-serving statement that does not add anything to the context of [defendant's] previous statements." In making its final ruling, the trial court excluded the statement, finding Section 356 inapplicable and relying on "[Section] 352 as a secondary consideration and the potential emotional distraction and misleading the jury with regards to that."[15] The court noted, however, that "the People have no objection to the questioning of the detectives about the manner in which [defendant] was told of [McQuater's] passing."

During Sergeant Reynolds' cross examination, defense counsel asked whether defendant "started crying hysterically" when Sergeant Reynolds told her McQuater was dead; Sergeant Reynolds said she did. Defense counsel also asked whether

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[15] Trial counsel argued, and defendant maintains on appeal, that the excluded portion of the recording is admissible under Evidence Code section 1250. Evidence Code section 1250 defines an exception to the hearsay rule for certain statements regarding the declarant's then-existing mental or physical state. Because we conclude the trial court did not abuse its discretion in excluding portions of the interview under Section 352, we need not consider defendant's argument concerning the hearsay exception.

defendant was "still crying" when Sergeant Reynolds left the interview room; Sergeant Reynolds said he believed she was.

"A trial court's determination of whether evidence is admissible under [S]ection 356 is reviewed for abuse of discretion. [Citation.]" (*People v. Parrish* (2007) 152 Cal.App.4th 263, 274 (*Parrish*).) With respect to the trial court's characterization of defendant's reaction as "self-serving," defendant is correct that this is not dispositive of whether Section 356 applies. (See *People v. Arias* (1996) 13 Cal.4th 92, 156.) This was not, however, the only basis for the trial court's exclusion of the disputed portion of the recording. Evidence admissible under Section 356 may be excluded under Section 352. (*People v. Samuels* (2005) 36 Cal.4th 96, 130 [trial court did not err in excluding additional portions of recording offered by the prosecution on grounds including its finding "the tape was too long and would confuse the jury"]; *People v. Von Villas* (1992) 10 Cal.App.4th 201, 270-272 [balance of recording introduced by the prosecution properly excluded pursuant to Section 352].)

We reject defendant's position on the admissibility of the interview recording, which appears to be that when a portion of a police interview is admitted in evidence, the opposing party must always be permitted to introduce the entirety of that interview. None of the cases cited in defendant's opening brief support this position.

In *Parrish*, *supra*, 152 Cal.App.4th 263, for instance, the defendant elicited testimony from a detective concerning statements by another suspect that corroborated defendant's claim that his participation in a robbery was coerced. (*Id.* at pp. 269-270.) Then, over the defendant's objections, the trial court allowed the prosecution to elicit other testimony concerning the

same suspect's statements that suggested defendant's participation was voluntary. (*Id.* at pp. 270-271.) The Court of Appeal reasoned the admission of the other testimony was proper because "the 'subject' of the evidence proffered by defendant was whether defendant was coerced into participating in the robbery" and, if there were other statements in the interview "from which a contrary inference could be drawn, i.e. that defendant participated in the robbery willingly, those other statements are admissible because they are relevant to the subject of whether defendant's participation in the robbery was willing or unwilling." (*Id.* at pp. 275-276.) Thus, the Court of Appeal's Section 356 analysis focused on the relationship between the topics addressed in the various portions of the other suspect's interview with the detective. The bare fact that the disputed statements came in the same law enforcement interview had no independent weight. Nor, in any event, did the court suggest that such evidence is not subject to exclusion under Section 352.[16]

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[16] The same is true of the other cases cited in defendant's opening brief. In *People v. Harrison* (2005) 35 Cal.4th 208, our Supreme Court ruled that "once [the] defendant had introduced a portion of [the other suspect's] interview with [the investigator] into evidence, the prosecution was entitled to introduce the remainder of [the] interview to place in context the isolated statements . . . related by [the investigator] on direct examination by the defense." (*Id.* at p. 239.) In *People v. Wharton* (1991) 53 Cal.3d 522, our Supreme Court ruled that "[b]y eliciting evidence that defendant had accepted responsibility for the [prior] killing, defendant presented evidence from which the jury could infer that his moral culpability for that crime was somewhat reduced. On redirect, the prosecutor was entitled to rebut that inference with evidence of the entire conversation, revealing that defendant's admission of guilt was not an admirable expression of

Here, defendant contends her reaction to news of McQuater's death explains why her tone in the first interview might be perceived to be inconsistent with the gravity of the situation. But even if defendant's reaction to word of McQuater's death "ha[s] some bearing upon" her earlier statements (*Brooks*, *supra*, 3 Cal.5th at p. 50, internal quotation marks and italics omitted) such that it was admissible under Section 356, the trial court did not abuse its discretion in concluding it was inadmissible under Section 352. The jury heard from Sergeant Reynolds that defendant did not learn of McQuater's death until the end of the first interview and that she cried hysterically. The probative value of the jury actually hearing this hysterical crying—which also included repeated laments about what McQuater's death would mean to the couple's children—was substantially outweighed by the risk of undue prejudice.

G. The Trial Court Did Not Abuse Its Discretion By Permitting the Prosecution to Play a Video Clip in Rebuttal

In its rebuttal case, the prosecution sought to introduce a three-minute cell phone video recorded by defendant in late August 2015, approximately 10 days before she shot McQuater. In the video, defendant and McQuater play with their two daughters and defendant mentions their plans to go to the beach

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remorse but was instead made under circumstances showing a false and morally objectionable sense of personal justification." (*Id.* at pp. 592-593.) In both cases, the Section 356 analysis turned on the contextual significance of the omitted statements, not the fact that the statements were made during a single interview with investigators.

the next day. According to the prosecution, the video rebutted Dr. Kaser-Boyd's testimony "about whether or not [defendant] was suffering from PTSD, because she certainly seems happy-go-lucky, not under any unusual stress or anything like that. [¶] It undercuts the hypothetical that was given by [defense counsel] and it rebuts . . . Breaux'[s] testimony that when she was on the phone with the defendant a couple days later, the defendant became afraid as soon as [McQuater] walked into the room."

Defense counsel objected to the video and argued it was not proper rebuttal evidence because it was cumulative of the jail calls and did not rebut Dr. Kaser-Boyd's testimony regarding the cycle of violence in abusive relationships. The trial court ruled the video was admissible because it rebutted "the theme and the . . . evidence . . . that the defendant was scared of [McQuater]" and the video was played for the jury.

"The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion. ([Penal Code] § 1093, subd. (d); [citation].)" (*People v. Young* (2005) 34 Cal.4th 1149, 1199.) "'[P]roper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.'" (*Ibid.*) On the other hand, "[t]estimony that repeats or fortifies a part of the prosecution's case that has been impeached by defense evidence may properly be admitted in rebuttal. [Citations.]" (*Ibid.*) The restrictions imposed on rebuttal evidence are intended "'to assure an orderly presentation of

evidence so that the trier of fact will not be confused; to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence.'" (*People v. Brown* (2003) 31 Cal.4th 518, 579, quoting *People v. Carter* (1957) 48 Cal.2d 737, 753-754.)

Defendant contends the video belonged in the prosecution's case in chief because "the fact that the rebuttal evidence tended to prove—that defendant intended to kill—was obviously central to the criminal prosecution . . . ."[17] In defendant's view, the prosecution knew she would present evidence of IPB and its effects and, in anticipation thereof, offered the jail calls to show defendant was not afraid of McQuater.

The trial court appropriately exercised its discretion to permit the evidence in rebuttal. It was generally responsive to the IPB defense proffered by defendant, and even though it was a relatively weak rebuttal given Dr. Kaser-Boyd's testimony that periods of calm may be part of a cycle of violence, it was still in the nature of a rebuttal to the defense case. Moreover, the record provides no basis to believe the defense was justifiably caught by surprise by the video evidence or unable to meet it with further evidence during its sur-rebuttal case at trial had the defense believed it necessary.[18]

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[17] Defendant does not continue to advance the argument that the video was inadmissible because it was cumulative.

[18] The defense likely concluded the rebuttal video did not require any further presentation of evidence (and could be addressed in closing argument) because neither Dr. Kaser-Boyd

H. Cumulative Error

Defendant contends that even if the errors at her trial did not prejudice her when considered individually, their cumulative effect requires reversal. Having failed to establish multiple errors, defendant's cumulative error claim is meritless. (See, e.g., *People v. Sattiewhite* (2014) 59 Cal.4th 446, 491; *People v. Edwards* (2013) 57 Cal.4th 658, 767.)

I. Senate Bill 620

The trial court sentenced defendant, as required by then-governing law, to 40 years to life in prison. This sentence was partly composed of a consecutive term of 25 years to life based on the jury's true finding on the alleged Penal Code section 12022.53, subdivision (d) enhancement.

Senate Bill 620 took effect after defendant's sentencing. (Sen. Bill No. 620 (2017-2018 Reg. Sess.) [effective January 1, 2018].) Senate Bill 620 amended Penal Code section 12022.53 to give trial courts discretion, in the interest of justice, to strike a firearm enhancement finding made under the statute. (Pen. Code, § 12022.53, subd. (h), as amended by Stats. 2017, ch. 682,

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nor any of the other defense witnesses had suggested defendant lived in constant fear of McQuater and because there was voluminous evidence of the nature of the rocky and abusive relationship between McQuater and defendant. Indeed, the evidence of that abuse and the marginal relevance of the rebuttal video in light of the defense mounted (particularly the specifics of Dr. Kaser-Boyd's testimony) also leave us convinced it is not reasonably probable the jury would have reached a verdict more favorable to defendant absent presentation of the video. (*People v. Daniels* (1991) 52 Cal.3d 815, 860.)

§ 2 ["The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section"].)

Defendant contends we should remand the case to the trial court so it has an opportunity to consider whether to exercise its discretion under Penal Code section 12022.53, subdivision (h). The Attorney General agrees the trial court should be afforded the opportunity to consider whether to strike the firearm enhancement. We agree a remand for that purpose is appropriate under the circumstances.

DISPOSITION

The matter is remanded to the trial court to permit the court, if it so chooses, to exercise its discretion under Penal Code section 12022.53, subdivision (h). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

KIM, J.

JASKOL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.